No. 07-1258

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In The

Supreme Court of the United States

TOLLIS, INC., and 1560 N. MAGNOLIA AVE., LLC,

Petitioners,

vs.

COUNTY OF SAN DIEGO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is an adult business that is required to relocate under the terms of a municipal zoning ordinance denied a reasonable opportunity to open and operate where there are 68 parcels potentially available for use by an adult business and only one adult business needs to relocate under the ordinance?

2. Did Associate Justice Anthony M. Kennedy's concurring opinion in *City of Los Angeles v. Alameda Books,* 535 U.S. 425 (2002) (plurality opinion), overrule long-standing Supreme Court precedent establishing that a municipality does not bear the burden of showing that a relocation site for an adult business is actually available for purchase or lease?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
INTRODUCTION/SUMMARY OF ARGUMENT	1
STATEMENT OF THE CASE	5
A. Proceedings Below	6
B. Proceedings in This Court	8
ARGUMENT	8
I DÉJÀ VU WAS NOT DENIED A REASONABLE OPPORTUNITY TO RELOCATE	8
A. The Bright-Line Rules that Déjà Vu Advances Are Not Appropriate	11
B. The Industrial Zones Are Suitable Locations for an Adult Business	15
C. The Ninth Circuit Did Not Conclude that There Is an Inadequate Number of Sites Available in the County, but that this Deficiency Can Be Remedied by Sites Available in Other Jurisdictions	17
II THE COUNTY'S AMENDED ZONING ORDINANCE WAS ENACTED TO ADDRESS NEGATIVE SECONDARY EFFECTS, NOT TO SUPPRESS SPEECH	19

TABLE OF CONTENTS – Continued

Page

A. This Court Has Never Required a Municipality to List All Negative Secondary Effects the Ordinance Is Designed to Combat in the Preamble of the Ordinance 21

B. There Was Ample Evidence in the Materials Relied on by the Board Showing a Connection Between Adult Businesses and Excessive Noise and Traffic 22

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

City of Erie v. Pap's A.M., 529 U.S. 277 (2000)....22, 25

City of Los Angeles v. Alameda Books, 535 U.S. 425 (2002).....*passim*

Fantasyland Video, Inc. v. County of San Diego, 373 F. Supp. 2d 1094 (S.D. Cal. 2005).....*passim*

Lingle v. Chevron, 544 U.S. 528 (2005).....7

Mitchell v. Commission of Adult Entertainment, 10 F.3d 123 (3rd Cir. 1993).....25, 26

North Avenue Novelties, Inc. v. City of Chicago, 88 F.3d 441 (7th Cir. 1996).....14

Northend Cinema, Inc. v. City of Seattle, 585 P.2d 1153 (Wash. 1978).....25

Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).....*passim*

Tollis, Inc. v. County of San Diego, 505 F.3d 935 (9th Cir. 2007).....*passim*

Walnut Properties v. City of Whittier, 861 F.2d 1102 (9th Cir. 1988).....14

Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).....25

Respondent County of San Diego (the "County") respectfully submits this opposition to the Petition for a Writ of Certiorari filed by Tollis, Inc. and 1560 N. Magnolia Ave., LLC.

INTRODUCTION/SUMMARY OF ARGUMENT

Under the County's amended Zoning Ordinance, adult businesses such as Déjà Vu[1] must relocate to specified industrial zones. Déjà Vu is currently operating in a commercial zone and is the ***only*** adult business that needs to relocate. The district court found that there was no disputed issue of material fact that there are 68 sites/parcels that are available where Déjà Vu could relocate its business. ***Déjà Vu did not challenge the district court's finding on appeal.***

A large portion of Déjà Vu's Petition for a Writ of Certiorari is spent arguing that this Court's precedents have not clearly defined the precise factors courts should consider in determining whether a zoning ordinance has denied an adult business "a reasonable opportunity to open and operate. . . ." *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54

[1] The business that operates at 1560 N. Magnolia Ave. in the unincorporated County of San Diego is called "Déjà Vu." *Fantasyland Video, Inc. v. County of San Diego*, 373 F. Supp. 2d 1094, 1101 (S.D. Cal. 2005). The County will refer to Petitioners as Déjà Vu in this Opposition.

(1986). Even if this were true (which it is not), this case would not be an appropriate vehicle for the Court to expand on the "alternative avenues of communication" prong of the *Renton* test. *Id.* at 50. Whatever the precise factors that a court might consider, it is clear that a single adult business that can choose from 68 potentially available sites has not been denied a reasonable opportunity to open and operate.

Next, Déjà Vu argues that Associate Justice Anthony M. Kennedy's concurring opinion in *Alameda Books*, 535 U.S. 425, overrules the holding in *Renton* that a local government does not bear the burden of showing that the specific parcels of property where an adult business may locate are actually available for purchase or lease. Déjà Vu contends that "it seems apparent that what Justice Kennedy contemplated when imposing the 'how speech will fare' analysis was to require the examination of whether there were relocation sites that an adult business could actually purchase or lease." (Déjà Vu Brief, at 27.) Justice Kennedy, however, specifically disavowed any intention to overrule *Renton*. First, Justice Kennedy stated that he was writing his concurring opinion because "the plurality's application of *Renton* might constitute a subtle expansion" of that decision, not to overrule it. 535 U.S. at 445. Later in his concurring opinion, Justice Kennedy stressed that "the central holding of *Renton* is sound. . . ." *Id.* at 448. Accordingly, there is no reason for this Court to reconsider *Renton's* holding that sites need only

potentially be available for lease or purchase, not that they actually be available for an adult business to lease or purchase.

Finally, Déjà Vu urges the Court to grant certiorari because the lower courts have purportedly had difficulty applying this Court's precedents specifying the type and amount of evidence that a local government must rely on to establish a connection between adult businesses and negative secondary effects. However, this Court has placed a slight burden on local governments, merely requiring them to rely on evidence that is reasonably believed to be relevant showing a correlation between adult businesses and negative secondary effects. The evidence that the County relied on was more than sufficient to meet the County's slight burden of showing the required correlation.

In enacting the amended Zoning Ordinance, the County's Board of Supervisors (the "Board") relied on: (1) 28 studies/reports from other jurisdictions that establish a correlation between negative secondary effects and adult businesses (Supplemental Excerpts of the Record ("SER"), Vol. 4, at 453 through Vol. 9, at 1718; 1752-1833); (2) more than 30 reported cases that discuss the correlation between adult businesses and negative secondary effects in other jurisdictions (SER, Vol. 3, at 16-17, 141-42; Vol. 9 at 1719-47); and (3) the public testimony of 15 witnesses who discussed negative secondary effects correlated with adult businesses. (SER, Vol. 9, at 1906-23.) In addition, the Board made findings in the preamble of the

amended Zoning Ordinance regarding the negative secondary effects associated with adult businesses. (SER, Vol. 3, at 15-17.)

At the district court, Déjà Vu's expert attempted to "rebut" the County's evidence, asserting that the studies the County relied on were "methodologically" flawed and that his own studies were proper "empirical" studies and showed that adult businesses are not associated with increased crime rates. The district court found that Déjà Vu had not successfully rebutted the County's evidence showing a correlation between adult businesses and crime, decreased property values, blight, excessive noise and traffic. The Ninth Circuit likewise held that Déjà Vu had not rebutted the County's evidence because its expert had not even addressed the evidence showing that adult businesses are correlated with excessive noise and traffic.

This Court has consistently placed a slight burden on local governments to produce evidence showing that adult businesses are correlated with specific secondary effects. *Alameda Books*, 535 U.S. at 442 (municipalities may rely upon any evidence that is "reasonably believed to be relevant") (internal quotation marks and citation omitted); *id.* at 451 (Kennedy, J., concurring) ("very little evidence is required"). There is no doubt that the evidence the County relied on satisfies the "very little evidence" standard and Déjà Vu's failure to address the evidence showing a correlation between adult businesses and excessive noise and traffic demonstrates that it did not rebut

the County's evidence. Therefore, this case is not a proper vehicle to address issues relating to the types and amount of evidence on which local governments may rely in establishing a connection between adult businesses and negative secondary effects.

STATEMENT OF THE CASE

In May 2002, Déjà Vu began operating an adult entertainment establishment in unincorporated San Diego County. (Appellants' Excerpts of Record ("AER") at 5, ¶ 17.)[2] Déjà Vu's business involves "the sale of sexually oriented novelties, magazines, newspapers and books" as well as "the sale and rental of prerecorded sexually explicit videos, CD's and DVD's. . . ." (*Id.* at 4, ¶ 13.) Déjà Vu is located in an area that is zoned for commercial use. (*Id.* at 4, ¶ 16.)

In June 2002, the County's Board passed Ordinance No. 9469, entitled "An Ordinance Amending the San Diego County Zoning Ordinance Relating to Adult Entertainment Establishments" (the "Amended Zoning Ordinance"). (SER, Vol. 3, at 15-32.)[3] The

[2] The Excerpts of the Record and Supplemental Excerpts of the Record were filed in the Ninth Circuit.

[3] The legislative record that was considered by the Board when it enacted the Amended Zoning Ordinance was part of the record on appeal and is contained in the Supplemental Excerpts of the Record.

Amended Zoning Ordinance became effective in July 2002. (*Id.* at 32.)

The Amended Zoning Ordinance requires adult entertainment establishments to be located within the following industrial zones: M50, M52, M54 or M58. (SER, Vol. 3, at 21-23, §§ 2503(a), 2523(a), 2543(a), 2583(a).) The Ordinance also prohibits adult entertainment establishments from being located "within 500 feet of any area zoned so as to permit the family residential use type as a primary use by right, or within 600 feet of any church, school, public playground or park, or within 1,000 feet of another such adult entertainment establishment." (*Id.*, Vol. 3, at 25, § 6930(b)(2).)

A. Proceedings Below

On October 11, 2002, Déjà Vu filed a lawsuit challenging the County's Amended Zoning Ordinance and provisions of the County's Regulatory Ordinance governing adult entertainment establishments. (SER, Vol. 1, at 1-23.) Another adult business in the unincorporated County, Fantasyland Video, Inc. ("Fantasyland") had filed a complaint against the County on September 24, 2002 also alleging that various non-zoning ordinance provisions regulating adult entertainment establishments violated the First Amendment. (*Id.*, Vol. 2, at 506-28.)

The County filed a motion for judgment on the pleadings as to Déjà Vu's complaint, which was granted in part and denied in part. (*Id.*, Vol. 2, at

531-39.) On April 16, 2004, Déjà Vu filed an amended complaint. (AER at 1-24.)

On August 5, 2004, the district court ordered the Fantasyland and Déjà Vu cases consolidated for pre-trial purposes. (SER, Vol. 1, at 46-53.) All of the parties subsequently moved for summary judgment. On June 14, 2005, the district court issued a ruling on the parties' cross-motions for summary judgment. (AER at 151-230.) In a published decision, the district court upheld the provisions of the County's Amended Zoning Ordinance against Déjà Vu's First Amendment challenge.[4] *Fantasyland Video,* 373 F. Supp. 2d 1094.[5]

On July 18, 2005, the trial court entered judgment in this case. (SER, Vol. 2, at 460.)

On August 10, 2005, Déjà Vu filed a notice of appeal. (*Id.* at 461-62.) On October 10, 2007, the Ninth Circuit issued a published opinion upholding the constitutionality of the County's Amended Zoning

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[4] The district court also ruled in the County's favor on Fantasyland's lawsuit.

[5] In the summary judgment ruling, the district court ordered Déjà Vu to show cause why its regulatory takings claim should not be dismissed based on the district court's conclusion that, for First Amendment purposes, the County's Amended Zoning Ordinance advanced a legitimate governmental interest. *Fantasyland Video*, 373 F. Supp. 2d at 1158. In a follow-up brief, Déjà Vu admitted that based on this Court's holding in *Lingle v. Chevron*, 544 U.S. 528 (2005), its regulatory takings claim should be dismissed. (SER, Vol. 2, at 454-56.) The district court subsequently dismissed Déjà Vu's claim. (*Id.* at 457-58.)

Ordinance. *Tollis, Inc. v. County of San Diego*, 505 F.3d 935 (9th Cir. 2007). On January 3, 2008, the Ninth Circuit denied Déjà Vu's Petition for Rehearing.

B. Proceedings In This Court

Déjà Vu filed a Petition for a Writ of Certiorari in this Court on April 2, 2008. The Petition was placed on the docket April 4, 2008.

ARGUMENT

I

DÉJÀ VU WAS NOT DENIED A REASONABLE OPPORTUNITY TO RELOCATE

Déjà Vu is the only adult business in the County that needs to relocate as a result of the County's Amended Zoning Ordinance. *Tollis*, 505 F.3d at 942. In the proceedings before the district court, the County identified 76 sites that are potentially available for Déjà Vu to relocate. *Fantasyland Video*, 373 F. Supp. 2d at 1132. Déjà Vu argued that numerous sites identified by the County were not available. *Id.* After a detailed review of the declarations submitted by the experts for both sides, the district court found that four of the sites identified by the County were not available. *Id.* at 1140. The district court also found that there were material issues of fact regarding whether another four sites identified by the

County were available. *Id.* Thus, the district court determined that Déjà Vu had not created a disputed issue of material fact that there are 68 sites available in the County for adult businesses to relocate. *Id.* at 1140-41. Pursuant to Ninth Circuit precedent, the district court determined that each of the 68 sites was "reasonably accessible to the general public," had "proper infrastructure" and was suitable for "some generic enterprise." *Fantasyland Video*, 373 F. Supp. 2d at 1133-35.[6] At the Ninth Circuit, "Déjà Vu did not

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[6] In *Renton*, the Court held that the local government does not have to present evidence that any particular parcel of land is actually available for lease or purchase by an adult business. *Renton*, 475 U.S. at 53-54 ("Respondents argue, however, that some of the land in question is already occupied by existing businesses, that 'practically none' of the undeveloped land is currently for sale or lease, and that in general there are no 'commercially viable' adult theatre sites within the 520 acres left open by the Renton ordinances. The Court of Appeals accepted these arguments, concluded that the 520 acres were not truly 'available' land, and therefore held that the Renton ordinance 'would result in a substantial restriction' on speech. We disagree with both the reasoning and the conclusion of the Court of Appeals. That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation.") (citations and footnote omitted). Déjà Vu argues that in his concurring opinion in *Alameda Books*, Justice Kennedy intended to overrule this portion of the *Renton* holding. According to Déjà Vu, "it seems apparent that what Justice Kennedy contemplated when imposing the 'how speech will fare' analysis was to require the examination of whether there were relocation sites that an adult business could actually purchase or lease." (Déjà Vu Brief, at 27.) No lower court has agreed with Déjà Vu's reading of Justice Kennedy's concurring opinion in *Alameda Books*. Indeed, it is apparent that Justice Kennedy did not

(Continued on following page)

contest any of the district court's individual determinations with respect to these remaining 68 parcels." *Tollis*, 505 F.3d at 941 (footnote omitted).

Given the potential availability of 68 sites for an adult business, no further analysis was necessary to ensure that Déjà Vu had a "reasonable opportunity to . . . operate" its business in the unincorporated County of San Diego. *Renton*, 475 U.S. at 54. Nonetheless, the district court also calculated the percentage of land that the County had set aside for adult businesses. The district court determined that 4.46% of the total industrially- and commercially-zoned acreage in the unincorporated County was available

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intend to overrule *Renton* on this point. Justice Kennedy stated that he was writing his concurring opinion in *Alameda Books* because "the plurality's application of *Renton* might constitute a subtle expansion" of that decision, not to overrule it. *Alameda Books*, 535 U.S. at 445. Later in his concurring opinion, Justice Kennedy stressed that "the central holding of *Renton* is sound. . . ." *Id.* at 448. Further, Déjà Vu's argument is inconsistent with its position that Justice Kennedy's concurring opinion in *Alameda Books* involved the "substantial governmental interest" prong of the *Renton* test, not the "alternative avenues of communication" prong of that test. Examination of the availability of alternative sites for lease or purchase falls under the "alternative avenues of communication" prong.

At the Ninth Circuit, Déjà Vu offered a different interpretation of Justice Kennedy's concurring opinion in *Alameda Books*, asserting that he intended to require local governments to "provide at least some evidence establishing a reasonable likelihood that such businesses can survive, economically, under the restrictions of the ordinance." (Déjà Vu's Ninth Circuit Reply Brief, at 5.) Once again, no lower court has agreed with Déjà Vu's interpretation of Justice Kennedy's concurring opinion.

to adult businesses and that this amount of available land was constitutionally sufficient. *Fantasyland Video*, 373 F. Supp. 2d at 1142. The Ninth Circuit agreed with the district court's analysis. *Tollis*, 505 F.3d at 942.

A. The Bright-Line Rules that Déjà Vu Advances Are Not Appropriate.

Déjà Vu urges the Court to grant certiorari in order two adopt two bright-line rules. First, Déjà Vu urges the Court to hold that in all circumstances a court must calculate the percentage of the total area of the municipality that is available for adult businesses. Next, Déjà Vu urges the Court to hold that the First Amendment requires a municipality to set aside, at a minimum, 5% of the total area of the municipality for adult businesses. The Court should reject Déjà Vu's invitation to create these bright-line rules. Such rules are not appropriate.

The present case is a perfect example of why such bright-line rules are not warranted. The County's Amended Zoning Ordinance only applies to the unincorporated areas in the County of San Diego, not to the 18 incorporated cities in the County. The unincorporated County is unique when compared to other municipalities. The unincorporated area of the County is huge – 2,286,059 acres (which translates into 3,572 square miles). (SER, Vol. 2, at 544, #22.) However, it is undisputed that much of that land – 1,352,122 acres – cannot be developed for any purpose (commercial, industrial or residential) because it is

owned by governmental entities or Indian tribes, and is being used for military bases (Camp Pendleton), parks (Anza-Borrego State Park, Cleveland National Forest, County parks), open space preserves, highways, airports, libraries, etc. (*Id.*, at 453, ¶ 2.) Further, 249,521 acres of the unincorporated area of the County are being used for agricultural purposes. (*Id.* at ¶ 3.) Agricultural lands are generally not suitable for commercial/industrial development.

Subtracting 1,601,643 acres from the total of 2,286,059 acres leaves 684,416 acres that theoretically could be developed for commercial/industrial purposes. However, of that total, approximately 550,000 acres consists of (1) uninhabited and remote desert areas, (2) steep mountainous or canyon slopes and (3) large residential parcels, with little or no nearby development. (*Id.* at ¶ 4.) These areas, for physical reasons (steep slopes) and practical reasons, such as lack of access and groundwater, cannot be developed. (*Id.*) Thus, this leaves less than 134,416 acres available for residential, commercial and industrial development.

Indeed, very little land in the unincorporated County is zoned for any industrial or commercial use. It is undisputed that 2,318.66 acres are zoned for industrial use and 2,764.86 acres are zoned for commercial use in the County. *Fantasyland Video*, 373 F. Supp. 2d at 1142. When these figures are added together, they show that only 5,083.52 acres are zoned for either industrial or commercial use in the unincorporated County and this is less than 0.22% of

the County's total acreage. Does this small percentage indicate that the County is discriminating against industrial and commercial businesses generally or that industrial and commercial businesses do not have a reasonable opportunity to open and operate in the unincorporated County?[7] Of course not. Rather, the small amount of land that is zoned for industrial and commercial businesses merely reflects the fact that much of the unincorporated County is uninhabitable, other areas are sparsely inhabited and that the population is concentrated near the incorporated cities. (SER, Vol. 2, at 452-53.) Similarly, the fact that a small percentage of the total area of the unincorporated County is available for adult businesses does not show that adult businesses are being discriminated against or that they do not have a reasonable opportunity to operate. The small percentage merely reflects how land is used in the County and how its population is distributed.

Requiring courts to calculate the percentage of the total area of the municipality that is available for adult businesses will lead to widely varying percentages depending upon the overall size of the municipality and how sparsely it is populated. This percentage will say nothing about whether an adult business would have a reasonable opportunity to locate in the municipality.

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[7] It is well recognized that commercial and industrial businesses are favored by local governments because of the tax revenues they generate.

Further, requiring a minimum of 5% of the total area of the municipality to be set aside for adult businesses is not necessary to ensure that an adult business will have a reasonable opportunity to open and operate. In this case, if Déjà Vu's bright-line rules were adopted, the County would have to set aside 114,303 acres (5% of 2,286,059 acres) for adult businesses. This amount of land would grossly exceed the amount needed for the only adult business that needs to relocate under the County's Amended Zoning Ordinance.

Indeed, the lower courts are in uniform agreement that the bright-line rules advocated by Déjà Vu are unnecessary and not helpful in determining whether an adult business has a reasonable opportunity to operate. *See North Avenue Novelties, Inc. v. City of Chicago*, 88 F.3d 441, 445 (7th Cir. 1996) ("The constitution does not mandate that any minimum percentage of land be made available for certain types of speech. What it does require is that zoning schemes that regulate the location of speech provide a 'reasonable opportunity' to disseminate the speech at issue. Requiring a 'reasonable opportunity' in each region can, and most likely does, result in vastly different acreage percentages. But those differences in no way imply that the regions with lower percentages are acting unconstitutionally."); *see also, Walnut Properties v. City of Whittier*, 861 F.2d 1102, 1108 (9th Cir. 1988) ("[U]nder the terms of the ordinance in question, an estimation of total available acreage is next to meaningless." Because of the ordinance's

dispersal or separation requirement, "[t]he number of sites available to adult businesses under the ordinance, therefore, depends not so much on the total amount of acreage available under the zoning scheme, but on how that acreage is dispersed throughout the City.").

B. The Industrial Zones Are Suitable Locations for an Adult Business.

Déjà Vu also makes much of the fact that under the County's Amended Zoning Ordinance, adult businesses are required to be located in industrial zones and that other commercial businesses are generally not allowed to locate in those zones. Déjà Vu implies that the industrial zones are not suitable for generic commercial businesses. However, that is clearly not the case. The district court found that each of the 68 sites located in the industrial zones was "reasonably accessible to the general public," had "proper infrastructure" and was suitable for "some generic enterprise." *Fantasyland Video,* 373 F. Supp. 2d at 1133-35. Déjà Vu did not challenge that determination on appeal. The fact that most commercial businesses are not legally allowed to operate in industrial zones says nothing about whether those zones are suitable for commercial businesses such as adult businesses. *Tollis*, 505 F.3d at 941-42 ("Whether or not an industrial zone *permits* generic commercial business within its borders rests on a legislative policy judgment. Asking whether an industrial zone *is suitable for* generic commercial

activity examines the physical characteristics and infrastructure of the land within the zone. . . . If an industrial site is reasonably accessible and has sufficient infrastructure to be 'available' . . . , it remains available even if its use for other commercial purposes may be restricted by the zoning law. . . . As Déjà Vu does not challenge any of the district court's holdings with respect to the suitability of any one of the 68 parcels for generic commercial use, its argument fails.") (citations omitted) (emphasis added).[8]

Indeed, the fact that other types of commercial businesses are generally not allowed to operate in industrial zones gives adult businesses a distinct advantage by reducing the competition for available parcels from commercial businesses.

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[8] Déjà Vu's assertion that the Ninth Circuit's decision on this point conflicts with other Ninth Circuit decisions is simply wrong. The Ninth Circuit has never decided a case where only adult businesses – not other types of commercial businesses – are allowed to locate in industrial zones. As the Ninth Circuit aptly recognized, an adult business's opportunity to relocate to an industrial zone is not hampered by the fact that other types of commercial businesses cannot locate in that zone.

C. The Ninth Circuit Did Not Conclude that There Is an Inadequate Number of Sites Available in the County, but that this Deficiency Can Be Remedied by Sites Available in Other Jurisdictions.

Déjà Vu asserts that the Ninth Circuit concluded that "even if there were insufficient industrial locations within San Diego County to which adult businesses could relocate, it could 'fairly be presumed' that there were other suitable areas for adult uses 'outside the territory governed by the ordinance in question.'" (Déjà Vu Brief at 13) (citation and emphases omitted). Déjà Vu is wrong. The district court found that there ***were sufficient relocation sites within the unincorporated County*** where Déjà Vu could relocate. *Fantasyland Video*, 373 F. Supp. 2d at 1140-41. That determination prevailed at the appellate level because Déjà Vu did not challenge the district court's finding. *Tollis*, 505 F.3d at 942 ("The district court determined that the remaining 68 sites, on which eight to 10 adult entertainment businesses could operate simultaneously, were sufficient to allow Déjà Vu – the only affected adult entertainment business in the county – an opportunity to relocate. Déjà Vu does not challenge this holding. . . .") (citation omitted) (emphasis added).

In explicit recognition of the fact that there are reasons unrelated to the suppression of free speech why the County has little land that is zoned for any type of commercial or industrial business, the Ninth Circuit made the following statement:

> It also must be borne in mind that the City of San Diego and the other incorporated municipalities in the county are not governed by the ordinance. The unincorporated portions of the county take up the substantial majority of the land area but only a small fraction of the population of the county as a whole. It may be fairly presumed that most of the commercial property in the county, including property suitable for adult businesses, is located within municipal boundaries and thus outside the territory governed by the ordinance in question. At least where we are dealing with "unincorprorated" areas, it is appropriate to recognize the likely availability of other locations within the same economic market in neighboring municipalities.

Id.

The Ninth Circuit did not conclude that the unincorporated County had an inadequate number of available sites for adult businesses, but this "deficiency" could be remedied by the likely availability of sites in nearby incorporated cities. Rather, the Ninth Circuit merely recognized in *dicta* what makes perfect sense – residents in an urban community made up of many different municipal jurisdictions (18 incorporated cities and the unincorporated County within the County of San Diego) do not visit commercial establishments located only within the municipal jurisdiction where they live. Many residents of the rural unincorporated County travel to incorporated cites to shop at big box retailers such as Home Depot

and Lowes. The incorporated cities tend to have more land zoned for commercial and industrial purposes because the population density in the incorporated cites is sufficient for commercial and industrial businesses to operate profitably. Therefore, it is logical to presume that incorporated cities will have additional locations available for adult businesses.

Further, the Ninth Circuit did not rely on the availability of sites outside of the County's jurisdiction to determine that the County has an adequate number of sites. The district court found that the County had an adequate number of sites within its own jurisdiction and Déjà Vu did not challenge this finding on appeal.

Because it is clear under any standard that Déjà Vu has a "reasonable opportunity" to relocate its business under the County's Amended Zoning Ordinance, the Petition should be denied.

II

THE COUNTY'S AMENDED ZONING ORDINANCE WAS ENACTED TO ADDRESS NEGATIVE SECONDARY EFFECTS, NOT TO SUPPRESS SPEECH

The Ninth Circuit determined that the County enacted the Amended Zoning Ordinance in order to reduce secondary effects associated with adult businesses, not to suppress speech. *Tollis*, 505 F.3d at 939. Citing the County's response to one of its interrogatory questions, Déjà Vu takes issue with that

determination, asserting that "the County candidly acknowledged that relegating adult uses to industrial districts would have the effect of reducing the patronage of those establishments." (Déjà Vu Brief, at 8.) However, the district court properly rejected Déjà Vu's interpretation of the County's interrogatory response. *Fantasyland Video*, 373 F. Supp. 2d at 1131-32 ("The response, when considered in its entirety, does not support the conclusion the County amended the ordinance to reduce the number of customers by making it more inconvenient to patronize adult entertainment businesses. Instead, the focus was on the patrons of the neighboring businesses. Furthermore, many industrial businesses are closed at night when adult entertainment businesses are busiest. The neighboring industrial businesses and their patrons would therefore not be as affected by secondary effects such as noise, traffic and crime, as are commercial businesses, which are often open at night. The reference in the response to reducing the number of potential crime victims therefore referred to the patrons of the neighboring businesses, rather than to adult entertainment patrons."). The Ninth Circuit did not disagree with the district court's determination.

Accordingly, the County enacted the Amended Zoning Ordinance in order to reduce negative secondary effects, not to suppress speech.

A. This Court Has Never Required a Municipality to List All Negative Secondary Effects the Ordinance Is Designed to Combat in the Preamble of the Ordinance.

Next, Déjà Vu asserts that ***every*** secondary effect that the legislative body believes is correlated with an adult business must appear in the preamble of the ordinance regulating adult businesses in order for the local government to rely on that secondary effect during litigation. Déjà Vu argues that the County's Amended Zoning Ordinance does not specifically state in the preamble that it was enacted to reduce noise and traffic associated with adult businesses; therefore Déjà Vu argues that its expert should be excused for failing to address the evidence relied on by the County's Board showing that adult businesses produce excessive amounts of noise and traffic particularly during late night hours. (Déjà Vu's Brief, at 12, n.15) ("Because these considerations were not even articulated as governmental interests of concern in the preambles to the Ordinance . . . the Plaintiffs' expert witness simply did not address these matters in his declaration.").[9]

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[9] The County's Amended Zoning Ordinance was also designed to combat other negative secondary effects of adult businesses such as crime, blight, and decreased property values. The district court found that Déjà Vu's expert had failed to "cast doubt" on the evidence relied on by the County to establish a correlation between these secondary effects and adult businesses. *Fantasyland Video*, 373 F. Supp. 2d at 1110, 1132. The Ninth Circuit did not reach the question whether Déjà Vu's

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This Court has never held, however, that each of the negative secondary effects correlated with adult businesses must be discussed in the preamble to the ordinance. Rather, this Court's "cases require only that municipalities rely upon evidence that is reasonably believed to be relevant to the secondary effects that they seek to address." *Alameda Books*, 535 U.S. at 442 (internal quotation marks and citations omitted). That evidence may consist of findings made in the preamble of the ordinance, but this is not the only evidence a municipality might believe is relevant. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 279 (2000) (plurality opinion).

B. There Was Ample Evidence in the Materials Relied on by the Board Showing a Connection Between Adult Businesses and Excessive Noise and Traffic.

In enacting its Amended Zoning Ordinance, the County relied on numerous studies from other jurisdictions, public testimony, and judicial decisions discussing the negative secondary effects correlated with adult businesses. Some of those sources discussed the

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expert had "cast doubt" on these other secondary effects. Instead, the Ninth Circuit held that Déjà Vu's expert had not addressed the secondary effects of noise and traffic and therefore had not cast doubt on those secondary effects. *Tollis*, 505 F.3d at 940. ("Déjà Vu's attempt to cast doubt on the County's conclusions fails as a matter of law because its expert . . . did not rebut the County's evidence with regard to noise and traffic.").

excessive noise and traffic produced by adult businesses, particularly during the late night hours. *Fantasyland Video*, 373 F. Supp. 2d at 1107-08. Those studies were in the legislative record and were relied on by the County's Board when it passed the Amended Zoning Ordinance. This Court has held that local governments may rely on such studies to meet their burden of showing that an ordinance is designed to advance a substantial government interest. *Renton*, 475 U.S. at 51.

Déjà Vu asserts that there is some disagreement among the lower courts regarding whether evidence showing a connection between adult businesses and specific secondary effects (here noise and traffic) can be relied upon during litigation if that evidence was not before the legislative body when it enacted the ordinance.[10] Even if such a disagreement existed, this case would not be an appropriate vehicle to review such a disagreement because the evidence demonstrating a connection between adult businesses and excessive noise and traffic was before the County's Board when it passed the ordinance. Déjà Vu contends in this Court that no such evidence was before

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[10] In *Alameda Books*, the Court concluded that municipalities may rely on new evidence if a defendant is able to "cast doubt" on the municipality's rationale or original evidence. *Alameda Books*, 535 U.S. at 439 ("If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.") (citation omitted).

the Board, but the district court found such evidence in the legislative record upon which the Board relied and Déjà Vu did not challenge this finding on appeal.[11] *Fantasyland Video*, 373 F. Supp. 2d at 1108 ("[T]he County relied on a voluminous legislative record, including numerous studies conducted by other municipalities, judicial opinions discussing similar secondary effects and public testimony ... [P]laintiffs' argument is targeted only toward evidentiary support addressing late night crime, and does

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[11] At the Ninth Circuit, Déjà Vu made various arguments why it believed that requiring adult businesses to be located in industrial zones would not reduce noise and traffic in residential and commercial zones, areas where more people live and where businesses that generally operate longer hours are located. For instance, Déjà Vu argued that the County somehow believed that the Amended Zoning Ordinance would reduce noise and traffic in commercial zones because "fewer customers visit industrial zones compared to commercial zones." (Déjà Vu's Ninth Circuit Opening Brief, at 31.) Déjà Vu attacked this straw man rationale vigorously. However, the County never asserted that a reduced number of customer visits to industrial zones was the reason why noise and traffic would be reduced in commercial areas. Rather, the County asserted that noise and traffic produced by adult businesses would be eliminated in commercial areas because adult businesses will be located in industrial areas, not commercial areas. The County explained this point in its interrogatory answers: "[R]equiring adult entertainment establishments to be located in industrial areas will reduce noise, traffic, and crime that effect commercial property owners and their patrons." (Appendix, at 240.) In any event, the County was only required to produce evidence that adult businesses are responsible for excessive noise and traffic, not that requiring adult businesses to be located in industrial zones will actually reduce noise and traffic in commercial areas.

not address the other targeted secondary effects such as late night noise, traffic and disorderly conduct. . . . [P]laintiffs' first argument fails as a matter of law to cast direct doubt on the County's evidence.").

Moreover, the district court was correct that there is evidence establishing a connection between adult businesses and excessive noise and traffic in the materials relied on by the County. For instance, the preamble to the Amended Zoning Ordinance indicates that the Board had considered the decision in *Mitchell v. Commission of Adult Entertainment*, 10 F.3d 123 (3rd Cir. 1993).[12] In that case, there was evidence that adult businesses "have become an absolute nuisance to the community in the form of additional traffic . . . ." *Id.* at 134. In addition, there was testimony that adult businesses cause "various problems . . . including noise, [and] traffic congestion. . . ." *Id.* at 136. In *Mitchell*, the court concluded

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[12] This Court has held that local governments may rely on the experiences of other jurisdictions as reported in judicial opinions to support an ordinance regulating adult businesses. *Renton*, 475 U.S. at 51 ("We hold that Renton was entitled to rely on the experiences of Seattle and other cities, and in particular on the 'detailed findings' summarized in the Washington Supreme Court's *Northend Cinema*[, *Inc. v. City of Seattle*, 585 P.2d 1153 (Wash. 1978)] opinion, in enacting its adult theater zoning ordinance."); *City of Erie*, 529 U.S. at 297 ("Erie could reasonably rely on the evidentiary foundation set forth in *Renton* and [*Young v.*] *American Mini Theatres*[, *Inc.*, 427 U.S. 50 (1976)] to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood.") (citation omitted) (plurality opinion).

that this evidence established a correlation between adult businesses and excessive noise and traffic. *Id.* at 137.

Further, many of the studies upon which the County's Board relied referred to excessive traffic and noise associated with adult businesses. *See* Final Report to the City of Garden Grove, SER, Vol. 5, at 653-54, 659 (real estate professionals and residents surveyed indicated that adult businesses cause increased noise and traffic); Staff Report Amendment to Zoning Regulations, January 9, 1978, SER, Vol. 5, at 711 ("For several years, the Police Department has received complaints of excessive noise. . . ." generated by adult businesses.); Adult Entertainment Study, City of New York, SER, Vol. 7, at 1163 (In public testimony, "[q]uality-of-life impacts, such as . . . noise . . . were often mentioned as impacts" of adult businesses.). Effects of Adult Entertainment Businesses on Residential Neighborhoods, SER, Vol. 8, at 1618 ("disturbing the peace" happened more in areas near adult businesses than areas away from adult businesses).

Because Déjà Vu did not attempt to rebut evidence that the County relied on showing a connection between adult businesses and excessive noise and traffic, this case is not an appropriate vehicle for the Court to examine whether a local government can rely on additional evidence produced during litigation showing a correlation between adult business and secondary effects.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ or Certiorari should be denied.

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Respectfully submitted,

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